Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

D.T.B., a minor child, by his next friend,
DANIEL J. O'CALLAGHAN, and
DANIEL J. O'CALLAGHAN, *Pro Se*, on his own behalf,

Petitioners,

v.

HON. JOHN J. FARMER, JR., in past or present official capacity as Attorney General of the State of New Jersey; HON. JOHN J. HARPER, in his past or present official capacity as Justice of the Superior Court of New Jersey, Chancery Division, Family Part; ANN T. SCUCCI; MATHIAS R. HAGOVSKY; and DAVID F. SALVAGGIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITON FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Does not the State's segregation of a child of unmarried parents and the father of such child for treatment different and unequal to child(ren) of married parents and such parent(s) violate the Equal Protection Clause. Has not the State failed the *heightened scrutiny* standard?

2. Has not the State failed to observe this Court's precedents which identify an unmarried father's 42 U.S.C. §§ 1983 and 1985(3) due process/ equal protection rights concerning association (*parentage and visitation*) with his child and the child's Constitutional protections?

3. Does not the State's use of illegal and unexamined evidence from a fake psychologist – statutorily prohibited concerning a child of married parents and such parents -- to position a severance/ termination of association (*visitation*) for 4 years between a previously always-involved loving father and his only child violate due process and equal protection?

4. Is not a *Rooker-Feldman* defense invalid as there has not occurred any "*final decision*" nor any decision on the merits at any time or by any court, nor has the State's highest court (or any State court) issued a final decision – or any decision -- which is "*inextricably intertwined*" with the Federal constitutional issues presented to the district court?

5. Does not the State's "*10 a.m. – 6 p.m.*" New York City – mid-New Jersey twice monthly Saturday or Sunday "*visitation*" for 2 years upon counsel's "*They're not married, they're not married*" and a concocted "dust on the floor" contention from a fake and partial psychologist violate due process and equal protection?

6. Does not the State's contention for *Rooker-Feldman* conflict with this Court's *certiorari* review standard as identified in *Florida v. Thomas*, 532 U.S. 774 (2001)?

7. Does not immunity fail for a person who claims this special treatment but who fails in all performance?

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HON. JOHN J. FARMER, *et al.*

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The opinion of the United States District Court for the District of New Jersey is not officially reported, is dated August 9, 2001, and appears in Appendix ("**App**") A at 1a. The order of the District Court which granted Defendants' Attorney General John J. Farmer, Jr.'s and the Hon. John J. Harper's motion to dismiss is not officially reported, is dated August 9, 2001, and appears in App B at 15a. The amended order of the District Court which addressed the amended complaint is not officially reported, is dated December 17, 2001, and appears in App C at 17a. The order of the District Court which granted summary judgment in favor of Defendant Mathias R. Hagovsky is not officially reported, is dated September 26, 2003, and appears in App D at 19a.

The opinion and judgment of the Court of Appeals for the Third Circuit which affirmed are not officially reported, are dated September 14, 2004, and appear in App E and F at

21a-24a. The decision upon sur petition for rehearing of the Court of Appeals for the Third Circuit which denied the petition for rehearing en banc is not officially reported, is dated October 20, 2004, and appears at App G at 26a.

JURISDICTION

The order of the District Court which dismissed the complaint against Attorney General John J. Farmer and Hon. John J. Harper was entered on August 10, 2001. The amended order to the same effect was entered on December 19, 2001. The order of the District Court which denied 28 U.S.C. § 1291 (b) relief to this Court was entered on November 20, 2001. The order of the District Court which granted summary judgment in favor of Defendant Mathias R. Hagovsky was entered on September 30, 2003.

Subject matter jurisdiction in the District Court was grounded upon 28 U.S.C. § 1331. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTORY AND RULE PROVISIONS

As outlined in the Appendices, these provisions are involved: 42 U.S.C. § 1983 and 1985 (3) and Federal Rules of Civil Procedure ("FRCP") Rules 12 (b) and 56 and the New Jersey Parentage Act, New Jersey Family Therapist Privilege, and New Jersey Family Court Rules

STATEMENT OF THE CASE

This case arises out of a N.J. family court case conducted since June, 2000, before the Hon. John J. Harper ("**Judge Harper**") and since November, 2001, before the Hon. David B. Rand ("**Judge Rand**"). This case relates to the Parentage Act and children of unmarried parents.[1]

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[1] N.J. Parentage Act, establishes a "parent and child relationship" "... includes...father and child relationship" and "extends equally to every

Subsequent to the father's filing in June, 2000, of a N.J. family court clerk-prepared complaint for ***paternity and visitation*** relating to D.T.B., Judge Harper accomplished an absence of all visitation ("association").[2] Instead, virtually immediately, on August 24, 2000, Judge Harper used a defendant-mother's counsel's submission of a false letter from Jeannette Lofas ("**Lofas**"), a fake "Ph.D." or "Dr." with "associates" in N.J. ("**Stepfamily.com**") to extinguish a then 56-year old father's relationship with his then 8-year-old son and only child. This was accomplished solely in consequence of counsel's, David F. Salvaggio's ("**Salvaggio**"'s) submission of the Lofas letter dated August 24, 2000:[3]

> *... I am a psychologist and have seen ... [the mother, child and father] .... I do not believe that it is in ... [DTB]'s best interest to be forced to sleep overnight at his father's house at this time. .... It seems that ... [DTB] and his father have a good relationship. .... signed, [Lofas], Ph.D.*

Lofas's contentions relate solely to the one (1) night use of an upstairs bedroom for the child. Notwithstanding false and unexamined, these contentions were accepted upon

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child and to every parent, regardless of the marital status of the parents"; Closed court.... *App I at 29a.*

[2] Complaint dated June 22, 2000. *App K at 36a.* For six (6) months before and two (2) years after child's June 19, 1992, N.Y.C. birth, the parents resided together. Subsequent to nearly eight (8) years of uninterrupted/ substantial continuity of relationship between father and child, in early May, 2000, absent all cause or justification, the mother prevented all relationship between father and child. In consequence, the father filed said complaint for paternity and visitation.

[3] Lofas repeatedly misrepresented "*Ph.D*", "*Dr.*", and "*I am a psychologist*". Salvaggio presented Lofas's "resume" also which included a fake "Ph.D" credential and website "...44,000 hits/ month". Submissions were in violation of NJ's "*Family Therapist Privilege*". *App I at 29a.* Nonetheless, immediately – and for nearly 4 years -- Judge Harper and the N.J. Appellate Division have used this letter to sever/ terminate all parent/ child relationship between DTB and his previously always-involved father.

Salvaggio's insistence for Lofas's determinative role and solely grounded upon Lofas's "Ph.D." and "Dr." credentials – soon revealed as fake. Days earlier, the Hon. Christine Miniman, a family court judge, had criticized Judge Harper's and Salvaggio's contended authorization for the mother's immediate entrance into the father's N.Y.C. home so as to "*interview the plaintiff-father's wife*" upon a "phase-in":

> "*The child is not 18 months old. This is a 7 year old boy who's had a ... relationship with his dad for an extended period of time. .... I don't get the concept of easing him in to overnights, frankly.*"[4]

Nonetheless, upon Lofas's letter, Judge Harper imposed in a summary support order "*no overnights*" and designated local "favorites" including a former law clerk Ann T. Scucci ("**Scucci**") and a local "psychologist", Mathias R. Hagovsky ("**Hagovsky**"), to review the case, "see" the child and report "within 14 days":

Salvaggio	*[testifies] ... Lofas is a psychologist. ... I happen to know your Honor...that he [Dr. Hagovsky] is around...*
Judge Harper	*.... I agree with the psychologist [Lofas] that we work toward and phase-in ...[reads Lofas letter] to an overnight. I'm going to appoint ... Scucci ...["High 5" gesture by Salvaggio]. ... Yeah, we're*

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[4] Upon service of the complaint for paternity and visitation, Salvaggio -- *ex parte*, through family court personnel -- facilitated an absence of all association between father and child (except 1 afternoon) to/ until Judge Miniman's "phase-in" critique in mid-August, 2000. Immediately, upon this first overnight as directed by Judge Miniman (and the first overnight in 4 months), Salvaggio procured Lofas's immediate involvement and letter and presentation to Judge Harper.

Several months later, Judge Miniman was transferred from the Morris county family court to a different county.

not talking overnights until I can get someone to see the child.....[W]e'll call immediately... [N]eed ... Dr. Hagovsky's help ... to get on it immediately. ...I'm going to get ... Dr. Hagovsky We'll get him appointed and notified immediately.... [W]e can get a telephonic report...So we don't have to wait for a written report -- ... something going here right away... I'd like to get the telephonic report within 14 days. I want this. ....

Upon the father's August 28, 2004, prompt revelation that Lofas secretly had traumatized the child ("*DTB's Discussion*") --again absent all hearing or other fair process -- immediately, Judge Harper secretly retracted the days-earlier "order" for these favorites to perform. Thus, in violation of the August 24, 2000, order, interviews of the mother and child -- scheduled immediately by Salvaggio with Hagovsky for September 7-9, 2000 -- secretly were canceled by Salvaggio.

This occurred with Hagovsky's knowledge and consent, indeed, promptly upon Salvaggio's receipt of *DTB's Discussion* which documented Lofas's culpability. On September 8, 2000, secretly, Judge Harper directed that Scucci attend, prejudicially excused Scucci's absence of performance, failed to direct any future performance, then – absent "track system" process, instead, another summary support order -- directed the 2 designated appointments "to continue":

Salvaggio *... I, have no relationship at all with ... [Scucci]...I have never been affiliated with her in any way. I don't have personal relationship with her....[whispering by law clerk: "... [Scucci]'s on her way ... on her way ...] ... I think had said let's have telephone conference with ... [Hagovsky] ... I called him yesterday afternoon to make*

sure that he knew that we would need to, you know, put it off ...

Scucci *Your Honor... I have not received a copy of the ... [appointment order].*

Harper,J. *That's right ... Other than the fact that the order was signed, there has been no work to my knowledge that was required ... No, I didn't direct you at this point to take any action.*

Scucci *OK.*

Harper,J. *The Order was signed and that's as far as it's gone.*

Scucci *I'm going to give each of the parties my business card so that they have a way to contact me so that if your Honor does decide that you do wish me to become involved in this case ...*

Harper,J. *OK. Fine. ... [Scucci exits courtroom.]*

In consequence, during the period of the child's observed distress, *i.e.*, August 28, 2000 - September 8, 2000, Judge Harper assured that the designated GAL and psychologist – lauded just days earlier - did not intervene.

Thereafter, for months – then years -- Judge Harper failed to enforce his own summary support orders for mere Saturday or Sunday 10 a.m. – 6 p.m. calamitous (round trip) inter-state "association" between DTB's Chester, N.J., residence and his father's Brooklyn, N.Y. home. Thereafter, absent any confidentiality protection for this then 8-year-old child (now 12 ½) as mandated by the Parentage Act, Judge Harper retained the case in chambers for at least 10 months. This violated Family Therapist Privilege and case "track

system".[5] This case addresses conflicts between Scucci, Salvaggio and their many-months secret "of counsel" arrangement through a third Morristown attorney, Michelle Hart ("**Hart**").

On December 6, 2000, subsequent to 4 months of inaction by Scucci and Hagovsky – and the day after the N.J. Appellate Division's "No" to any prompt interlocutory appeal grounded upon Judge Harper's misuse of Lofas – Scucci sent a secret, unsigned letter to Judge Harper and to Salvaggio (also telephoned) contending performance.

On December 8, 2000 -- 4 months after the designations -- the next open court proceeding was held, *i.e.*, just (i) 1 day after Scucci's false "*He didn't call me back*" excuse letter, and (ii) 3 days after the N.J. Appellate Division's summary denial of any interlocutory appeal upon use of the Lofas letter in violation of the *Family Therapist Privilege*. At this proceeding, for the first time it was revealed that Hagovsky had not performed for 4 months. In the interim, the child was restricted to "10 a.m. to 6 p.m." inter-State association with his father for a few hours on a few days.

Upon the December 8, 2000, production of Scucci's letter, there were revealed on the letterhead conflicts with Salvaggio, *e.g.*, both these single practitioners' offices included Hart as "of counsel". Scucci had not accepted the GAL designated assignment, had not performed for 4 months,[6]

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[5] *See App J at 30a – 31a, e.g.*, "track systems" for a child (or children) of married parents – none for this child. Earlier, in July, 2000, Judge Harper ordered probation to conduct a "best interests" investigation. Upon Lofas's letter, Judge Harper replaced probation with a compliant former law clerk, Scucci: "*I will do whatever your Honor wants me to do*". Judge Harper failed to forward the "best interests" order to probation or place the case on any "track". Thus, no investigation conducted by anyone, *i.e.*, until 2 years later by Lee Monday, Ph.D.

[6] Purportedly, Scucci briefly interviewed the child on October 8, 2000. Thereafter, Scucci did nothing for 2 months notwithstanding an August 30, 2000, order: " … *shall interview the parties and the child*".

had not provided statutory "notice"/ monthly statements for services and had never communicated with the father. Nonetheless, Scucci fabricated an excuse: "...*[He] didn't call me back*". Throughout, August 25–December 8, 2000, absent any "stay", neither the mother nor Salvaggio re-scheduled appointments with Hagovsky or with Scucci -- and neither Hagovsky nor Scucci intervened. Thus, a timely examination of the child during the period of distress caused by Lofas was avoided.[7]

The father's requests for Scucci's telephone records/ cross-examination were denied by Judge Harper in an injudicious December 8, 2000, proceeding which included slurs against the father's deceased parents and (unsuccessful) efforts to have the father engage in a criminal offense in the courtroom.[8] Scucci never resumed the (purported) October 8, 2000, child interview, never interviewed the mother or anyone else, never obtained records of school/ neighbors, friends or

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[7] Scucci was designated upon R.5:8B which provides: **(a) Appointment.** ...[a] [GAL]...may be appointed... if...circumstances warrant ..... **(b) Objection ....** A proposed ...[GAL] shall have the right to consent or to decline ..., notice of such ... to be in writing ...The parties shall have the right to object ... *App J at 33a – 34a.*

Judge Harper and Scucci were engaged in joint action to conceal Scucci's non-performance while Judge Harper awaited (eventual, *i.e.,* December 4, 2000) N.J. Appellate Division (interlocutory) summary approval for violation/ avoidance of Family Therapist Privilege concerning a child of unmarried parents. Scucci's failure to provide Rule 5:8B written notice/ monthly statements facilitated this plan.

[8] Commonly, Judge Harper has handcuffed and shackled prisoners – typically, minority men – sitting in the jury box "bleachers" to observe the routine in proceedings concerning unmarried fathers. Upon Salvaggio's demand, Judge Harper ordered that the father accept transfer of title to a vehicle in the mother's name and valued at nearly $5,000 for "$1". The N.J. title document (reverse side) identifies as a misdemeanor/ jail sentence/ fine to a recipient of a title transfer for less than "*fair market value*". This exists in order to prevent the registered seller from failure to pay sales tax at actual value.

conducted any "*investigation*", *and never provided* (or was required to provide) explanation for such disinterest/non-performance.[9]

In mid-December, 2000, Judge Harper, Salvaggio, Scucci, and Hagovsky, together, pursued immediate interviews and reports under threat for sanctions, dismissal of the complaint and extinguishment of all "visitation" – *de facto* which already had been accomplished. Meanwhile, inhumane 10 a.m. – 6 p.m. interstate bi-weekly Saturday/ or Sunday "association" continued during these 4 months – and as events developed through N.J. appellate court disinterest -- for an additional 2 years. On December 29, 2000, for the first time, Salvaggio wrote to Hagovsky enclosing copies of orders upon which Salvaggio provided "excuse" to Hagovsky for the many-month injurious absence of any Hagovsky performance:

> *[T]his week, you requested that I fax you the Orders ... your appointment [August 25, 2000]... "see the child" and "report...within 14 days". However, the process did not go forward, because...[father]... application...[for]...[stay]...*

Contemporaneously, the father filed a grievance with the Advisory Committee on Judicial Conduct ("**ACJC**"). Judge Harper assured that at no time or in any manner would/ could Scucci (or anyone) be made subject to sworn testimony, production of telephone records/ other information or appearance in open court.

In January, 2001, upon receipt of information that the father had filed a complaint with the ACJC and that the N.J. Supreme Court summarily had denied a motion for interlocutory appeal, Judge Harper planned "dismissal" of the complaint for paternity and visitation -- but not on the

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[9] Scucci's letter – not signed -- sought a boarding future for the child, then 8, at a NYC 24/7 school approached through the 1992 N.Y. birth certificate upon which the mother had concealed the father's identity, thus contending "sole custody".

merits.[10] On February 2, 2001, the father sought disqualification of Scucci, Salvaggio, and Hagovsky upon conflicts/ improprieties and non-performance for 4 months.

Notwithstanding that the father's late-December, 2000, "reconsideration submissions" (and February 2, 2001, disqualification motion) presented for the first time (i) conflicts of interest, (ii) objection to Salvaggio's direction to Hagovsky not to perform and failure to perform for at least 4 months, (iii) objection to Scucci's failure to satisfy R.5:8B notice/ statements, fabricated "*No call back*" excuse and request for telephone records, sworn testimony and court appearance, and (iv) observed increasing distress of the child, Judge Harper avoided accountability for himself and his local friends by dismissing complaint for paternity and visitation *without prejudice* in a February 6, 2001,"Letter Decision"/ order which also "relieved of duties" (except as "volunteers") the culpable regulars, Scucci and Hagovsky (also, implicitly, Salvaggio). In March, 2001, Judge Harper rewarded Salvaggio with a $10,000 order for attorneys' fees.[11]

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[10] In July, 2000, a prior Morris county family court judge had entered an order which established paternity in Petitioner-father.

[11] New Jersey does not use/ maintain any public list or "roster" of GAL candidates/ psychologists/ other experts in the family court system nor limitation upon earnings or number of case assignments. Instead, local "favorites" are selected by family court judges for enrichment in a system which remains absent actual accountability or objective standards.

During the lengthy period, *August, 2000 – April, 2002*, the mother failed on at least 28 Saturdays/ Sundays to provide even the 6-8 hour no-overnight (twice) per month inter-state "association" authorized.

From the September 11, 2001 attack on our nation at the World Trade Center through April, 2002, there occurred an absence of all "association": Judge Harper had authorized solely (dangerous) "exchanges" at the father's Dey Street, NYC, office located ½ block from the disaster site, or at Penn Station (NYC).

Upon the attack, the mother refused any "association" except "exchanges" at these 2 locations. Notwithstanding early October, 2001, "appeal",

Lofas did not appear upon subpoena/ other process; did not take the stand under oath; did not respond to questions on direct/ cross. Judge Harper repeatedly denied any/ all open court proceeding, then, placed the Lofas and Scucci letters "into evidence" absent any examination or appearance by anyone. Lofas was a fake "psychologist" who in violation of N.J. (and N.Y.) licensing requirements, submitted an unexamined/ false letter which became the pretext for the now more than 4-year severance/ termination. The letter submission was absent all testimony/ cross-examination, absent all court appearance/ trial, and was submitted (through Salvaggio) absent any court order/ involvement.

Dismissal was not "on the merits", rather, "sanction" for "reconsideration submissions" -- such grounded upon receipt of long-delayed court recordings which revealed the misconduct of Judge Harper concerning Scucci and Lofas and the absence of enforcement (or "Stay") of the August 25, 2000, order for *Hagovsky to "see" the child and "report within 14 days"*. Instead, Judge Harper positioned a cumbersome, expensive and as events developed, nearly 2-year preordained useless appeal to the N.J. Appellate Division while inter-State bi-weekly 10-6 "association" traumatized an 8-9-year old child.[12] Solely in order to promote prejudice --

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nearly 60 days later, *i.e.*, on November 29, 2001 (earlier, Judge Rand on November 7, 2001), the N.J. Appellate Division summarily validated these bizarre and dangerous "exchanges". In consequence, no association occurred between a nearly 60-year old father and only child for 6 months during this national tragedy – including public commemorations for 2 of the plaintiff-father's N.Y.C. firefighter cousins who remain entombed at the WTC disaster site.

[12] Inexcusably, for 20 months (DTB's entire 8th-9th years), the Letter Decision dismissal of complaint for paternity and visitation as a "sanction" languished in the N.J. Appellate Division absent decision. On the other hand, there occurred prompt validation of Judge Harper's authorization for bizarre and frightening visitation "exchanges" solely at the World Trade Center disaster site (or Penn Station (NYC)) for more than six (6) months.

In the past 4½ years, on behalf of DTB, the plaintiff-father has pursued numerous, comprehensive and expensive "interlocutory" "emergency" and

particularly relating to proceedings against Lofas pending in New York -- in the Letter Decision, Judge Harper revealed the existence of a December, 2000, statement of grievances (then) under consideration before the ACJC. Immediately upon notice that a Federal civil rights case had been filed, the ACJC abandoned a six (6)-month filed grievance absent all explanation or remedy.

Thus, absent all fair process -- or any examined evidence -- in February/ March, 2001, Judge Harper used false and unexamined Lofas and Scucci letters to dismiss *without prejudice* a father's complaint for paternity and visitation. Instead, Judge Harper (then the N.J. Appellate Division) maintained inhumane inter-State few-hour (10-6 Saturday or Sunday) "visitation" for nearly 2 years.[13]

Thereafter, *i.e.*, subsequent to 2 years of "severance/ termination", in/ about June, 2002, so as to promote any association, the plaintiff-father moved to Northeastern Pennsylvania – a predictable commute to DTB's Chester, NJ, residence. Secretly, however, late-2001 -- mid-2002, *i.e.*, during the 6-month period of the child's World Trade Center

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other "appeals" through N.J.'s Appellate Division in addition to motions to "expedite" and other requests relating to the child's obvious, unnecessary and worsening distress. Invariably, all relief has been denied summarily upon one line "No"'s. Invariably, this occurred after many months of disinterest and inaction.

[13] The "phase-in" could be accomplished (i) only via Staten Island Expressway, I-95, I-78 [or, Brooklyn-Queens Expressway, Manhattan streets, GW Bridge, I-80], N.J. 206, then rural Chester, NJ roads – at best 90 minutes each way upon unpredictably congested roads -- by a then 8-10 year old child – (ii) in order 2 times monthly to have "association" for less than 6-8 hours with a previously always-involved father and (iii) as imposed for nearly 2 years, severed and terminated the Federal right to parent-child relationship. This was imposed upon child and father solely grounded upon Salvaggio's August 25, 2000, submission of Lofas' letter – *i.e.*, absent all discovery, hearing, trial or other evidence – excepting Scucci's "*Did not call me back*" December 8, 2000, concocted and unexamined excuse.

isolation, the mother enrolled DTB into another 24/ 7 boarding school, *viz.*, **American Boychoir** located in Princeton, NJ. In mid-June, 2002, unsolicited, Judge Rand advocated – then, authorized – the mother's "relocation" so as to accomplish enrollment. In consequence of "relocation" and the already adverse effects of 2 years of severance/ termination, the child had been traumatized and exhibited signs of great distress and alienation. In mid-August, 2002, Judge Rand designated Lee Monday, Ph.D. ("Dr. Monday") – a well-credentialed NJ psychologist – to provide an evaluation. Dr. Monday conducted lengthy interviews of the parents and child, and on August 30, 2002, advised: not to approve enrollment, significant expansion of the father's association/ guidance in the child's life and urgent requirement for the child's "*immediate therapeutic counseling*".

Concurrently, the mother's new counsel, Einhorn, Harris, *et al.* ("**Einhorn**"), a politically influential firm, sought to establish "relocation" through Princeton area cohabitation with a male stranger landlord. Judge Rand withdrew authorization for enrollment. Einhorn sought emergent relief in the Appellate Division to compel DTB's enrollment in this troubled school.[14] Notwithstanding that Dr. Monday's report was known to be imminent, the Appellate Division did not wait for it. Instead, within 48 hours (on *September 11, 2002*), again, summarily, reinstated authorization for the child's enrollment in American Boychoir. The child was enrolled and remains.[15]

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[14] *See New York Times* and *Nightline*, both April 16, 2002 re: long-term effects of sexual abuse to boys who had attended American Boychoir.

See also, *The Star Ledger*, October 5, 2003, "…[Divorce]: a Multimillion Dollar Industry". In New Jersey, "a … cast of professionals … besides the lawyers – forensic accountants, psychologists, real estate appraisers and certified divorce planners … and you have a multimillion dollar industry."

[15] Such "relocation" results in at least a 90 miles one-way commute between child and father, *i.e.*, encompasses at least five (5) hours of

Thus, through unequal treatment/ violation of due process, Judge Harper (later, Judge Rand and throughout the N.J. Appellate Division) injured a child of unmarried parents and the child's previously always-involved father. This has resulted in a more than 4-year wrongful severance/ termination of parent-child relationship.[16]

REASONS FOR GRANTING THE WRIT

A. No *Rooker--Feldman* Bar: Separate But Not Equal.

In *Rooker*, this Court held that a district court may not review the final decisions of a State's highest court of competent jurisdiction; such review may be obtained only in the Supreme Court. In *Feldman*, the Supreme Court authorized "*general constitutional challenges*" to State statutes/ rules/ practices.[17]

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dangerous round trip commutation through central N.J. This accomplishes a prohibitive, unexamined "move-away" and continues the already more-than 30-month severance/ termination.

[16] Notwithstanding that the N.J. courts have imposed inhumane 10 a.m.-6 p.m. few-hour "association" for nearly 3 years grounded solely upon misuse of a letter from a bogus "Ph.D", the State of Connecticut exposed this fake in a lengthy "***CEASE AND DESIST ORDER***" dated March 6, 2003. Nonetheless, the N.J. Appellate Division has declined to include this public order into any record for any appeal.

[17] *See generally, Robinson v. Ariyoshi*, 753 F.2nd 1468. 1472-73 (9th Cir. 1985): "*Rooker*...the Supreme Court...final arbiter, were ...[constitutional questions] 'actually *arose in the cause*' in which a *full hearing* was held and where the *judgment was responsive to the issues*...[citation omitted]. ....*Feldman*,...held that where allegations underlying a state's highest court's final judicial decision are '*inextricably intertwined*' with issues presented to a federal court, the federal court has no jurisdiction over those issues, even if those challenges included constitutional claims. ...[460 U.S. 462,. at 486, 103 S.Ct. 1303, at 1316-17].

[*Robinson* relied upon *Haring v. Prosise*, 103 S.Ct. 2368, 2373 (1983), a § 1983 action in which the Supreme Court had concluded]: "[C]ollateral estoppel...will not be given to a state court conclusion where the complaining party did not have full and fair opportunity to litigate a claim

The father's complaint presented claims for "***paternity and visitation***". The Letter Decision/ order dismissal was not on the merits, was not a final judgment (or "decision"). Thereafter, interlocutory motions for leave to appeal did not establish "finality", nor did the father's "full appeal" to the Appellate Division -- which specifically identified that such appeal was "not on the merits": the dismissal as a "sanction for reconsideration submissions" was not final under State or Federal law. The Federal complaint specifically alleges "*general constitutional challenges*" which were neither considered nor determined by any State court, more, were not "*inextricably intertwined*" with any State court final decision on the merits – which never has occurred.

In *Gubernat v. Deremer*, 140 N.J. 120 (1995), N.J.'s Supreme Court addressed the Parentage Act:

> *... [T]he Legislature stated: "... Act is intended to establish... regardless of ...marital status..., all children and parents have equal rights with respect to each other ...." .... "...claims of the natural father and the natural mother are entitled to equal weight,..." ... The Act also eliminated legal differences between children born in a marriage and children born out of wedlock, following a line of United States Supreme Court decisions "mandating equality of treatment between legitimate and illegitimate children."*
>
> .....
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> *...Legislature...has ended gender-based differences in...parental rights, ...instead determined that...disputes about children... resolved...in...child's best interests. Sex-based presumptions, such as.."tender years"... replaced by...inquiry focused on... happiness and welfare*

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in state court or where the state court demonstrated inability or unwillingness to protect federal rights... We are asked to review district court findings about constitutional claims which themselves were never decided by a state court, intertwined or otherwise. ...'

of...child.....Courts are required to engage in meticulous fact-finding to determine...best interests... ....[cit. omitted].

Although the N.J. Legislature intended "best interests" to govern, the policy/ practices of the State judiciary are to the contrary. The State's "*non-dissolution*" category for child/ children of unmarried parents omits any "track system", instead, summary support orders. The child's "best interests" never were considered. For no legitimate reason, the State judiciary shattered this child's 8-year continuity of relationship with his previously always-involved now 61-year old father. The destruction for (more than) 4 years of this child's "happiness and welfare" never were considered.[18]

These facts/ circumstances should assure remedies for both father and 8-12½ year old child -- one at the center of injury but grievances not addressed in any forum. *See e.g., Troxel v. Granville*, 530 U.S. 57 (2000). *Rooker-Feldman* was not intended to provide a shield for misconduct. As stated in *Miller v. City of Philadelphia*, 174 F 3rd 368 (3rd Cir. 1999):

> "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'". .... [citations omitted] .... The Supreme Court has recognized a "fundamental liberty interest of natural parents in the care, custody, and management of their children." *Santosky v. Kramer*, 455

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[18] The State Defendants have failed to satisfy minimum due process. *See Vitek v. Jones*, 445 U.S. 480, 491 (1980) ("minimum due process ...[are] a matter of federal law,...not diminished...that...State may have specified its own procedures that it may deem adequate ..."); *see Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3rd 808 (6th Cir. 2002) (*en banc*):

> [P]laintiff's due process interest is significant in that the judicial proceeding will determine the amount of time, if any, he can spend with his ... [child]. ... The Supreme Court has recognized the special nature of parental rights and has ... imposed special due process guarantees so that states may not lightly terminate parents' relationships with their children."(emphasis added).

> U.S. 745, 753 .... We, and other courts of appeals, have recognized this as a protectable interest. [citations omitted] ...." (emphasis added).[19]

This Court in *Florida v. Thomas*, 532 U.S. 774 (2001), identified standards for *certiorari* review of a State "decision" – *i.e.*, jurisdiction unavailable to/ until "final decision by final court". On October 29, 2002, the N.J. Appellate Division conceded "*not final*": remanded father's "sanctions" appeal – after 3 years -- for consideration of "*overnights", if any.*

State Law: The dismissal was "*without prejudice*". Under N.J. precedent, there has not occurred any adjudication on the merits and there does not exist any bar to reinstitution of the claim in a subsequent action. *Scalza v. Shop-Rite Supermarkets, Inc.*, 304 N.J. 636, 701 A.2d 764 (N.J. Super. A.D. 1997); *Christiansen v. Christiansen*, 46 N.J. Super. 101, 134 A.2d 14 (N.J. Super. A.D. 1957) (dismissal without prejudice is "nonsuit", adjudicates nothing).

Federal Law: In *Thomas, supra*, this Court addressed "final judgment" for *certiorari* jurisdiction. This Court precluded jurisdiction citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). This Court ruled that a State judgment was not final for § 1257 (a) review because (i) not conclusive, *i.e.*, outcome of further proceedings not preordained, and (ii)

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[19] *See also, Miller v. Christopher*, 96 F 3rd 1467, 1475-76 (D.C. Cir. 1996) (Wald, J., concurring in judgment upon *Caban v. Muhammed*, 441 U.S. 380 [,-- S.Ct. --] (1979)): stereotypes of relationships mothers and fathers have with their illegitimate children acceptable, if at all, only in infancy.

See generally, Clark v. Jeter, 486 U.S. 456 (1988) (equal protection concerning child of unmarried parents); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (equal protection citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) ("important as ... a state interest might be, we have repeatedly held that 'imposing disabilities on the illegitimate child is contrary to the basic concept of our system that burdens should bear some relationship to individual responsibility or wrongdoing'"; and *San Antonio School District v. Rodriguez*,, 411 U.S. 1, 28 (1977) ("suspect class" entitled to protections of strict scrutiny.)

remand could give rise to a Federal question that might come later to the Court. To be reviewable a State judgment must be final in 2 senses: it must (i) be subject to no further review/ correction in any other State tribunal, and (ii) be final as the effective determination of litigation, *i.e.*, not merely an interlocutory/ intermediate step – the judgment must be the "*final word of the final court*". *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997). *Accord Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981). *See generally*, "State Court Judgments – Finality", 29 L.Ed.2d 872; *Robinson v. Ariyoshi*, 753 F.2nd 1468, 1472-73 (9th Cir. 1985).

Respectfully, there does not exist "finality" to the (procedural/ "sanctions") Letter Decision/ order "appealed" to the N.J. Appellate Division. In consequence, the Supreme Court does not have jurisdiction pursuant to §1257 (a) to review any appeals which could be taken upon a petition for *certiorari* from the N.J. courts. Reliance upon *Rooker-Feldman* is invalid. As explained in *Thomas*, there has not occurred "Federal" (or State) "finality" to the February – March, 2001, Letter Decision/ order which were "on appeal". More, the Third Circuit narrowly construes *Rooker-Feldman*. *See Whiteford v. Reed*, 155 F.3d 671, 674 (3rd Cir. 1998) no bar to claim that had been rejected on procedural grounds by state court:

> ...[W]here a state action does not reach the merits of...claims, then *Rooker-Feldman* does not deprive the federal court of jurisdiction. *See* 22.*Gulla*, 146 F.3d at 172-73; *E.B. v. Verniero*, 119 F.3d 1077, 1091 (3rd Cir. 1997) (if state court had not decided merits of claim, *Rooker-Feldman* not bar).[20]

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[20] *See Gulla v. North Strabane Township*, 146 F.3d 168, 172-73 (3rd Cir. 1998) (no bar for lack of standing); *Ernst v. Child & Youth Servs.*, 108 F.3d 486, 491-92 (3d Cir. 1997) (no bar; Federal court "would not have required the court to find that the state court judgments ... were erroneous"); *FOCUS*, 75 F.3d, *supra*, at 841-42 (no bar; same); *Marks v.*

The remedies sought against the State Defendants, *i.e.*, declaratory judgment (or injunction), should have been granted which determined, as alleged:

- State judicial officials violated Petitioners' equal protection/ due process upon §1983 and §1985 (3) specific pleading facts through unremedied misconduct/ maladministration, as well as these *General Constitutional Challenges*;

- the State's (mis)application of the "Parentage Act", R. 9:17-38, *et seq.*, violates equal protection and is unconstitutional;

- the State's track system, *i.e.*, including "differentiated case management system", R. 5:1-4, *et seq.*, especially relating to an 8-12 ½ -year old child (and/ or such age children) who prior to State action always had maintained a substantive parent-child relationship with a previously always-involved father is unconstitutional;

Stinson, 19 F.3d 873, 885 n. 11 (3rd Cir. 1994) (no bar; Federal court found that claims had merit); *Valenti v. Mitchell*, 962 F.2d 288, 296 (3d Cir. 1992) (no bar: party lacked full, fair litigation).

See also, *Catz v. Chalker*, 142 F.3d 279 (6th Cir. 1998)and *Canal Capital Corp. v. Valley Pride Pack, Inc.*, 169 F.3d 508 (8th Cir. 1999), which authorize jurisdiction absent bar. *Catz*, at 142 F.3d at 293-95, explained:

> . . . . Here, the claims that survive ... are directed to the *procedures* ... that ... [the district court] found, if true, to be "shocking"…. Thus, permitting jurisdiction does not contravene ... *Rooker-Feldman* …. *See Sun Valley Foods Co. v. Detroit Marine Terminals, Inc.*, 801 F.2d 186, 188-89 (6th Cir. 1986). ... "...[a] federal court "may entertain a collateral attack on…state…judgment… alleged…procured through fraud, deception, accident, or mistake…." *Resolute Insurance Co. v. State of North Carolina*, 397 F.2d 586, 589 (4th Cir. 1968).

Sun Valley, 801 F.2d at 189. *See also*, *Lewis v. East Feliciana Parish Sch. Bd.*, 820 F.2d 143, 146 (5th Cir. 1987) (due process challenge -- not barred).

- the State's (mis)application of the Family Therapist Privilege concerning unmarried fathers and the child/children of such fathers is unconstitutional.

B. Complaint Adequately Alleges Civil Rights Violations[21]: No Trial and No Appeal

In reliance upon *Ward v. Village of Monroeville*, 409 U.S 57 (1972), this Court reaffirmed that due process requires a neutral and detached judge. *See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993)[22] In *Clements v. Airport Authority of Washoe County*, 69 F. 3d 321, 333 (9th Cir. 1995), the 9th Circuit identified the *Ward* standard:

> A biased proceeding is not a procedurally adequate one. ...Due Process requires a hearing before an impartial tribunal [citing *Ward*].... Petitioner is entitled to a neutral

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[21] *Domestic Relations: No Exception* -- The Sixth Circuit in *Catz v. Chalker*, 142 F.3rd 279 at 290-92 (6th Cir. 1998) addressed the "Domestic Relations exception" identified in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), concluding that the exception precludes Federal jurisdiction solely upon a plaintiff's positive suit in Federal court " *...for divorce, alimony, or child custody*". Here, Petitioners present civil rights claims for effective visitation, not such a positive suit.

[22] *See also, Alexander v. Whitman*, 114 F. 3d 1392 (3rd Cir. 1997) (state rule with special impact on less than all persons: question of equal protection). Federal law supports equal protection claims: § 1983 relief against a state official who selectively enforces out of malice/ bad faith intent to injure/ punish exercise of constitutional right. *See Futernick v. Sumpter Tp.*, 78 F. 3d 1051, 1055-59 (6th Cir. 1996); *Rubinovitz v. Rogato*, 60 F. 3d 906 (1st Cir. 1995).

See also, Exxon Corp. v. Heinze, 32 F. 3d 1399 (9th Cir. 1994) (due process concerned not only with actual bias of judges, but also with appearance of justice); *American Anti-Discrimination Committee v. Reno*, 70 F. 3d 1045 (9th Cir. 1995) (use of undisclosed information in adjudication presumptively unconstitutional); and *Sloan v. Delo*, 54 F. 3d 1371 (8th Cir. 1995) (due process guarantees that State must apply its own rules fairly).

and detached judge in the first instance. *See Ward,* 409 U.S. 57, at 61-62.

The pleadings identify with specificity facts which satisfy joint action. *See Spencer v. Steinman*, 968 F.Supp. 1011, 1017-21 (E.D. Pa. 1997) ("working relationship" and/ or "joint participation" as enunciated in *Lugar v. Edmondson*, 457 U.S. 922 (1982). There is alleged that "private parties" have acted under color of law as willful participants in joint action with State officials to deprive Petitioners of Constitutional rights. Petitioners sufficiently have alleged § 1985 (3) claims with "discriminatory animus". *See Storck v. Suffolk County Dept. of Social Services*, 62 F.Supp.2d 927 (E.D.N.Y. 1999).[23]

Judge Harper's misuse of Lofas's letter was in violation of the Family Therapist Privilege, a *Kinsella*-identified principle.[24] The State has failed to observe this Court's precedent which identifies an unmarried father's § 1983 due process/ equal protection rights concerning association with his child. *See Lehr v. Robertson*, 463 U.S. 248 (1983) (unmarried father's 14th Amendment rights to rearing of his child). *See Pena v. Mattox*, 95-2053 (7th Cir.1995) (Posner, C.J.):

> "…. …Supreme Court's decisions dealing with parental rights, … [*Santowsky v. Kramer*, 455 U.S. 745] and *Stanley v. Illinois*, 405 U.S. 645],… …. add[s] equal protection …, … at 658 – understandably in view of the cases in which

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[23] Liability may be imposed on private persons even if the state actor(s) is immune. *See Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *Franklin v. Terr*, 201 F.3d1098, 1100-01 (9th Cir. 2000).

[24] *See Kinsella v. Kinsella*, 150 N.J. 276, 696 A.2d 556 (1997), which addresses Rule of Evidence, R. 510 (the "**Family Therapist Privilege**"), a rule grounded upon the Federal right of privacy: "*A communication between a ... family therapist and the person or persons in therapy shall be confidential and its secrecy preserved. This privilege shall not be subject to waiver ...*" *App I at 29a.*.

the Court has protected the rights of illegitimate children. .... Stanley was an illegitimate father, as it were, and if illegitimate children are entitled to complain about discrimination in favor of legitimate children, perhaps unmarried fathers should be entitled to complain about discrimination in favor of married fathers. ....

...[W]e therefore assume that the Constitution forbids a state to deprive parents – fathers as well as mothers, including natural fathers – of their children without good reasons for doing so. .... It is not the ... biological fact of parentage, but the existence of an actual or potential relationship that society recognizes as worthy of respect and protection, that activates the constitutional claim. *Lehr v. Robertson*, 463 U.S. 248, 259-62 (1983). .... [W]hen the father ... has established a relationship with his child, the relationship receives the *prima facie* protection of the Constitution, ... *Stanley v. Illinois*, *supra*. ...."

Similarly, a child of unmarried parents has Constitutional protections. *See e.g., Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985):

"...[I]llegitimacy is beyond the individual's control ..., *Matthews v. Lucas*, 427 U.S. 495, 505, ... (1976), official discriminations ... subject to 'heightened" review'. These restrictions "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest" *Mills v. Habluetzel*, 456 U.S. 91, 99 ...(1982).").

In reliance upon *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the 11th Circuit held that § 1985 (3) applies to conspiracies grounded upon gender-based animus perpetrated under color of law. *See Lyes v. City of Riviera Beach*, 166 F.3rd 1332 (11th Cir. 1999). *Lyes* relied upon *Novotny v. Great Am. Fed. Sav. & Loan Assoc.*, 584 F.2d 1235, 1243 (3rd Cir. 1978) Here, the pleadings itemize gender-based animus against unmarried fathers, particularly bound in a State "*differentiated case management*" system and notwithstanding any Parentage Act application. More, the

pleadings itemize facts/ circumstances which evidence – for 4 years – and continuing -- a wrongful severance/ termination of an elemental civil right, *viz.*, a natural parent-child relationship. Sadly, the child's "status" as a child of unmarried parents upon unenforced Parentage Act directives likewise supports § 1985 (3) "class based invidiously discriminatory" charges.

Prerequisites have been satisfied for meritorious pleadings supporting §1983 and §1985 claims upon alleged deprivations of protected liberty interests. *See Skinner v. City of Miami*, 62 F.3d 344, 346 (11th Cir. 1995); *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52-53 (1st Cir. 1990). Similarly, the pleadings sufficiently allege deprivations of equal protection, *e.g.*, through contentions for illegal motive as alleged upon specific facts from which motive reasonably inferred and alleged specific discriminatory treatment together with support for the thesis that such discrimination was unlawful. *See Crawford-El v. Britton*, 523 U.S. 574 (1998)

In the manner identified, Judge Harper segregated this child – one of unmarried parents – for treatment different and unequal to children of married parents. *See "Parenting Time: A Child's Right" – i.e., "A ... Right"* except for a child/ children of unmarried parents. *N.J. Court Internet site at ___*: N.J. provides <u>different rules</u> for a child / children of unmarried parents as compared to a child/ children of married parents – and for the father of such child/ children. N.J. provides <u>summary</u> treatment for a child/ children of unmarried parents (and father) and precludes any "track system" to such child/ children (or father). In consequence, <u>all</u> "track system" process, *e.g.*, parenting time ("visitation"), custody, mediation, discovery, trial dates, and the like are replaced/ were replaced with hand-written notation(s) upon form orders.

In this manner, differences are State-imposed in a discriminatory manner (bias and favoritism) which promotes an arbitrary and capricious – indeed, secret and standardless – accomplishment of severance/ termination of parent-child

relationship. In consequence, New Jersey has not satisfied the *heightened scrutiny* standard for such child/ children (and father) and has acted in violation of the Equal Protection Clause.

It is obvious from the 4-year biased State trial court/ appellate court proceedings that no relief – or indeed process -- is available to the plaintiff-father or child in any manner in the State courts. The State's 3-year "no-overnight" inter-State agenda grounded solely upon prohibited use of Lofas's letter to position local "favorites", then to avoid (and validate) their non-performance for 4 months, then unfairly to dismiss a father's N.J. clerk's office-prepared complaint for visitation and paternity as soon as a meritorious ACJC grievance was revealed and Scucci's, Salvaggio's, and Hagovsky's disinterest, injurious inaction, and misconduct were exposed. Now, unlike a child of married parents – and notwithstanding the child's obvious anguish and trauma – after more than 4 years in N.J.'s system, this is where this child has remained:

- No direction for any "therapist" to assist DTB – urgently or otherwise;
- No "parenting plan";
- No visitation schedule;
- No Wednesday association -- ever;
- No telephone communications;
- No "exchange" arrangements at any place, any time, or in any manner;
- No identification of DTB's residence, telephone, cohabitation arrangements;
- No "custody" trial within 90 days – or ever;
- No amendment to DTB's birth certificate – ordered nearly 4 years ago;
- No Holiday schedule – none have occurred for 10 years;
- No mediation; and

- No identification of DTB's arrangements at American Boychoir.

Sadly, since mid-2000, the State has accomplished irrevocable injury to the child's well-being, indeed, has destroyed the child's entire "middle childhood". This has been accomplished and continues upon false excuses and irresponsible rulings – anything but reveal the misconduct and maladministration at the center of the family court "process". For such a child – and father -- the State system literally does not operate. For more than 4 years, not only has there been severed/ terminated an 8-year parent-child relationship, but also the State relentlessly has injured this child into life-long trauma. Inhumanely, the State has protected its own culpable adult personnel at the expense of an 8-12 year old defenseless child. *See generally*, *Carchman v. Korman Corp.*, 594 F.2d 354, 356 (3rd Cir.) (1979); *Pearson v. Miller*, 988 F.Supp. 848 (M.D. Pa. 1997).[25]

C. No Performance: No Immunity.

Hagovsky's motion was grounded upon *Hughes v. Long*, 242 F.3d 121 (3d Cir. 2001) ("*Hughes* II") in which there are facts/ circumstances different from those in this case[26], *e.g.*:

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[25] 11th Amendment not bar claims against the State Defendants, as here, solely for declaratory and/ or injunctive relief in official capacity. *See generally. MSA Realty Corp. v. State of Ill.*, 990 F.2d 288 (7th Cir. 1993); *Snell v. Tunnell*, 920 F.2d 673, 686, *et seq.* (10th Cir. 1990)(immunity principles); *Callahan v. City of Philadelphia*, 207 F.3d 668 (3d Cir. 2000) (11th Amendment analysis: a "*through the looking glass*" experience) .

[26] *See also*, *Snell v. Tunnell*, 920 F. 2nd 673, 689 (10th Cir. 1990):

> *An important prerequisite of absolute immunity...defendant "act as an actual functionary of the court, not only in status or denomination but in reality." [citing Gardner v. Parson*, 874 F.2nd 131, 146 (3rd Cir. 1989)]

> *...Long conducted the evaluation. She interviewed... She...referred... ....custody hearing, ...testified... and denied creating false reports ... or intentionally failing to comply with the court's order... The ...[court] adopted...recommendation and awarded joint custody ...*
>
> On appeal [*Hughes I*], we reversed .... an evidentiary record of ...[therapists] precise functions with respect to their participation in the underlying...case had not been developed..... ...[Therapist] may still be entitled to immunity if she performs "special functions".... .... We ... hold that ... [therapists] enjoy judicial immunity because they acted as "arms of the court", ...fulfills a quasi-judicial role at the court's request.
>
> *[P]erformed functions...[J]udicial immunity insulates...[therapists'] conduct..*

Here, although designated as a "therapist", Hagovsky never acted for at least 4 months – if ever. Instead, as intended, upon the father's August 28, 2000, identification of the child's distress, overtly and tacitly, Judge Harper and Salvaggio assured that Hagovsky did not receive any communication from the family court nor a copy of the August 25, 2000, order. Instead, as is Judge Harper's practice/ policy in cases concerning a child of unmarried parents (and father) together with the State's absence of "track system" for such child (or father), a secret telephone call from Salvaggio was all it took to stop Hagovsky's performance pursuant to the August 25, 2000, order – one which Hagovsky intentionally never had received.[27]

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[27] In this manner, the State wrongfully validated/ excused many years of inhumane inter-State association. Likewise, in this manner, the State wrongfully rewarded favorites in a patronage system which in reality remains disinterested in the child's "*happiness and welfare*". There has never occurred any hearing, plenary or otherwise, nor ever any scheduled.

The facts presented establish that Judge Harper and these private defendants engaged in joint action to undermine any/ all "performance" by Hagovsky. In order to assure that this plan remained effective to/ until a N.J. Appellate Division interlocutory review of the Family Therapist Privilege subject, likewise within days, secretly, Judge Harper obtained Scucci's appearance on September 8, 2000, upon contention that Scucci "*... here on another case*".[28] At this proceeding, Judge Harper assured that Scucci understood that no actual performance was to be undertaken, no actual notice was to be provided, no actual statement for services was to be provided, and no actual investigation was to be undertaken or even started. As agreed, these defendants awaited N.J. Appellate Division approval for wrongful avoidance of the Family Therapist Privilege prior to commencement of any investigation – if ever at all. In this manner, these defendants assured that as much time as possible would/ could have elapsed subsequent to the late-August, 2000, Lofas-inflicted injury to the child so that the then 8-year old child would/ could forget these events. The actors who have avoided performance have been rewarded in a system which lacks accountability and which has accomplished concealment of misconduct. These actors remain responsible for:

- **2000 – 20** days (no overnights);
- **2001 – 10** days (no overnights);
- **2002 – 15** days;
- **2003 – 1** day;
- **2004 -- 25** days
- **2005 – no** days

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[28] 5 months later, Scucci admitted that she was not at the proceeding "*on another case*". Scucci was summoned for the September 8, 2000, proceeding so as to assure that no performance could/ would occur.

In this August – December, 2000 plan and scheme not to perform, Hagovsky and Scucci did not act. These defendants have not satisfied the prerequisite for immunity: "act as an actual functionary of the court, not only in status or denomination but in reality". *Gardner, id.*. Here, Judge Harper positioned his local friends in order to avoid performance -- and none occurred. In consequence, now, for 4 years (and continuing), a severance/ termination of relationship has occurred and in reality cannot be remedied.

This is not a case where any opportunity for subsequent judicial review/ appellate review "... provides a check upon actions clothed with absolute immunity". *See Gardner, id.*, at 687, quoting *Mitchell v. Forsyth*, 472 U.S. 511, 522-23 (1985). Respectfully, this is not a case where such misconduct/ maladministration should be immunized.

More, Hagovsky's motion was premature. At best, the case was at the stage identified in *Hughes v. MacElree,* 168 F.3d 478 (3d Cir. 1998) ("*Hughes* I"), *i.e.*, "...an evidentiary record of...functions ...in...underlying custody case had not been developed". Here, there has not occurred the development of any evidentiary record. Indisputably, Hagovsky did not act pursuant to the August 25, 2000, order. More, Hagovsky's "role" at best was a mere investigator. As Hagovsky has not plead any immunity[29] nor shown that Hagovsky is a governmental official whose position involves exercise of discretion, (i) absolute immunity has been waived, (ii) and there has not occurred a shift of burden to Appellants to rebut qualified immunity. *See Pierce v. Smith,* 117 F.3d 986 (5th Cir. 1997); *Myers v. Morris*, 810 F.2d 1437, 1466-67

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[29] Hagovsky failed to contend "immunity" in 2 answers. Qualified immunity is an affirmative defense: Hagovsky bears the burden of proof. *See McKinnon v. Kwong Wah Restaurant*, 83. F.3d 498, 505 (1st Cir. 1996) (to avoid waiver, a defendant must assert all affirmative defenses in answer). *See also*, *Petrocelli v. Daniel Woodhead Co.*, 993 F.2d 27, 29 n.1 (3d Cir. 1993) (affirmative defense not raised in original pleading may be preserved).

(8th Cir. 1987) ("functional approach": separate analysis).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted and the judgment below reversed.

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January 17, 2005

Respectfully submitted,

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